Supreme Court, U.S.
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CASE NO. _____

UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

MARY ELLEN CHRISTIANSEN, PETITIONER

V.

ROBERT SMITH, et al., RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARY ELLEN CHRISTIANSEN
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29 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly affirmed the defendant city court judges' motion to dismiss on ground that the amended complaint is barred by the doctrine of judicial immunity, or if the defendant judges can be held accountable for the impediment of Fifth Amendment guarantees and that Title 42 U.S.C. (sec) 1983 can be revitalized as a protection against abuse of power by affording civil redress as was originally intended by the authors of that statute.

2. Whether the Oneida County District Attorney's Offices' conduct as prosecuting attorneys afforded it absolute and/or qualified immunity, or, their conduct was unconstitutional and therefore not covered by qualified immunity.

3. Whether the questions left open in Imbler v Pachtman, can be used to modify qualified immunity and include

malicious prosecution when in the investigative phase of a prosecution the charges do not meet the criteria of the governing criminal statute under state law, and also if they are unconstitutional.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE INSTANT CASE

The opinion of the Second Circuit Court of Appeals of the State of New York was rendered on December 17, 1993, and is contained in the Appendix. The judgment of the district court for the Northern District of New York was rendered on February 25, 1993, and is contained in the Appendix.

JURISDICTION

On December 17, 1993, the Second Circuit entered a decision affirming the judgment of the district court of the Northern District of New York.

This Court has jurisdiction to grant a Writ of Certiorari because the Second Circuit has decided a federal question in a way that conflicts with Title 42 U.S.C. (sec) 1983, and furthermore conflicts with opinions of other federal circuit courts.

Rule 10 of the Rules of the Supreme Court gives jurisdiction to review the judgment in question by Writ of Certiorari.

THE FEDERAL STATUTE INVOLVED

Title 42 U.S.C. (sec) 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution...shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I was charged with aggravated harassment in the second degree as a result of the complaints of a Dr. Robert Smith. This individual made out a City Court information and a summons was issued by Judge Garramone of the Utica City Court. Dr. Smith alleged that I knocked on his office window and rang his telephone. I was arraigned by Judge Ogonowski and after several appearances during which Judge Ogonowski threatened to keep running me to court unless I pleaded guilty, the charges were eventually adjourned in contemplation of dismissal when Judge Ogonowski finally realized that he could run me down to court 100 more times and I would still never plead guilty. However, an order of protection was issued by Judge Ogonowski even though there was no evidence of the allegations, investigation conducted, or innocence allowed proven.

I initially filed a 42 U.S.C.(sec.) 1983

complaint against Dr. Smith, the Utica Police Department, and the Oneida County District Attorney's Office. I then filed an amended complaint, and by motion added Judges Ogonowski and Garramone, judges of the City Court of Utica, New York.

In my amended complaint, I challenge the issuance of the summons and my prosecution alleging that Judge Garramone was responsible for authoring a meritless information for prosecution, and that Judge Ogonowski "prosecuted" false charges. I purposely use the term prosecute because although the adversarial system should operate in the courts, in Utica, New York, it does not always. The lawyers that were hired for defense did absolutely nothing. No motions whatsoever were filed. No standard requests for any evidence were entered. No motion for dismissal was entered for lack of evidence as is standard under New York State Criminal Procedure Law. No motions were entered for lack of

Constitutionality of the governing statute used even though the Second Circuit had just rendered an opinion on the unconstitutionality of the statute in question. (See People v Dietz, 75 NY 2d 47 1989).

Therefore I brought the present case alleging violations of Fifth Amendment guarantees by the wrongful activities of a city court judge; wrongful arrest and harassment during booking procedures by some Utica Police Officers, a meritless and unconstitutional prosecution by the Oneida County District Attorney's Office; and filing of a false accusatory instrument by a Dr. Smith.

ARGUMENT

ABSOLUTE AND/OR QUALIFIED IMMUNITY FOR A SELECT GROUP OF CITIZENS SHOULD BE MODIFIED

PRELIMINARY STATEMENT

In 1994, when pockets of relentless abuse of power plague the land of America all the way from our local city and town justice courts up to the Congress, never has there been a more urgent time for the doctrines of absolute and qualified immunity to be reviewed and modified. More specifically with regard to the instant case, when there are federal criminal statutes applicable to any person who impedes the Fifth Amendment due process rights of any other person, and when a select class of citizens refuses to discipline their own, then we, the people comprising the much larger class should not be precluded from civil redress against the select smaller class.

ARGUMENT

The United States Supreme Court has held since 1967 and 1976 only that judges and prosecutors are immune from civil suit. That view has been held for a time far shorter than the nearly two hundred years of developed Constitutional protections and guarantees. This Court accepted that view at a time when the general breakdown of ethic in this current society was not as pronounced as it now is. What may very well have been perceived in the past as occasional abuse of power not calling for the modification of absolute immunity, now should adjust to abuse of power which is more commonplace in 1994.

Title 42 U.S.C. (sec.) 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person with in the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution...shall be liable to the party injured in an action at law,

suit in equity, or other proper proceeding for redress."

In Monroe v Pape, 365 U.S. 167, 172 (1961), the Court stated that the central purpose of section 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." Title 42 U.S.C. 1983 expressly denies absolute immunity for all state officials as a class of persons. The United States Constitution limits state action and the statement of claim provided by Title 42 U.S.C. 1983 is fundamentally one for "misuse of power, possessed by virtue of state law and made possible only because the wrongdoing is clothed with authority of state law." United States v Classic, 313 U.S. 299, 326 (1941).

Title 42 U.S.C. 1983 and supporting case law was authored by advocates of true equality and freedom. They did not see the threat of retaliatory suits by dissatisfied litigants, rather they

interpreted the Constitution and its amendments as affording protection fairly for all American citizens, as well it should be able to above all other laws.

Obviously since section 1983 there has been case law contradicting this statute. I maintain that there is sufficient evidence to prove that there are mounting abuse of power problems in America. Given the state of our current society regarding ethic, it is good for the Court to consider backing up a bit, and giving new thought to the wisdom and logic embodied in the section 1983 statute itself.

Focusing more narrowly on qualified immunity, prosecutors are entitled to this lesser defense only if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2728, 73 L.Ed. 2d 396 (1982). The inquiry is one of objective

reasonableness. Wyler v United States, 725 F. 2d 156, 159 (2d Cir. 1983). New York State criminal statute Penal Law 240.25(2) was used by the Oneida County District Attorney's Office in bringing a meritless prosecution. Statute 240.25(2) was declared unconstitutional by the Second Circuit prior to the district attorney's initiation of the prosecution. (People v Dietze, 75 NY2d 47, 1989). It is not constitutional to bring unconstitutional criminal charges against any citizen.

To further focus on the prosecution, in the case cited by defense and quoted by the Second Circuit, Imbler v Pachtman, 424 U.S. 409 (1976), this Court left open the question of whether the evidence-analyzing and case preparation function performed by a prosecution before the actual filing of an information or indictment constitute prosecutorial or investigative tasks. (See Imbler 424 U.S.C. at 431 n. 33)

The specific questions left open in Imbler would be:

1. Whether to file an information
2. Whether and when to prosecute
3. What evidence to present

The supervision of and interaction with law enforcement agencies in acquiring evidence to be used in a prosecution is termed investigative and not covered as would be actual litigation under immunity. It stands to reason that if press disclosures, wiretaps, breach of promise, entrapment, and misuse of a grand jury are actionable under Title 42 U.S.C. 1983, (See Powers v Coe, 728 F.2d 97, 1984), then purposed negligence to marshal any evidence for unconstitutional criminal statutes for the sake of a clearly malicious prosecution should be included in that very narrow margin not covered by qualified immunity and actionable under section 1983. That is where I feel that the Court is able to budge just a bit on this problem of abuse of power, and especially when the criteria

for malicious prosecution is met under state law. In my case there was no evidence to marshal. The initiation of any prosecution should have been abandoned at that phase. I was quoted upwards of $10,000.00 to clear myself from unconstitutional charges with no evidence and for which the criteria was not met for the governing criminal statute if there was any evidence. This may be hard for judges to understand because most judges are wealthy, but 90% of Americans do not have $10,000.00 hanging around to throw at a defense against malicious influence peddling authorities. As it was presented on an NBC documentary, far too many people are pleading guilty to meritless charges because they do not have the large sums of money to buy justice, and authorities know that and take advantage accordingly. At that point, malicious prosecution can be included in that very narrow margin as criteria not covered by qualified immunity.

It is not a mistake by the prosecution, it is a fully intended abuse of power.

CONCLUSION

The Sixth Amendment gives me full authority to enter this domain pro se. Faretta v California, 422 U.S. 806, 819, (1975) supports that amendment. I have a wonderful opportunity to respond first person, and state that I do not believe that I should be written off as a worthwhile "casualty" for the more sacred importance of the preservation of the judges and prosecutors of America. I do not believe that the system would suffer annihilation if in the face of outrageous misconduct, any public authority is called to give account in civil suit. As I have stated, I agree with the authors of section 1983, and although I am pro se, they were highly qualified and well reasoned legal experts.

True equality for all classes of persons came heralding forward and experienced

a renaissance with United States v Classic and Monroe v Pape in 1941 and 1961, from the dark ages of Bradley v Fisher in 1871. Pierson v Ray, Imbler v Pachtman, and Mireless v Waco in 1967, 1976 and 1989 stalled a forward progression, but a slight reverse to the solid foundations of Title 42 U.S.C. 1983 would again set a forward direction toward equality for all classes of persons in America.

The beauty of our common law system is that it can adjust for the changing needs of the people it serves. A slight change in qualified immunity, and absolute immunity, to afford protection for all Americans in the face of clear and malicious abuse of power by authority is in no wise a total abandonment of a more recent view held only since 1967 and 1976. It is only a minor modification. It would above all put responsibility back into the hands of the citizenry for the conduct of their courts and authorities.

Civil redress for blatant abuse of power is the most powerful of tools for the cultivation and perpetuation of true liberty and would cause a rebirth of the fullness of the Constitution, in which we, the people, again mattered in this country.

Of the two criminal statutes used, the nonsensical allegations of Dr. Smith did not meet the criteria of statute 240.30 under state law. Statute 240.25(2) had already been declared unconstitutional by the Second Circuit. Men and women paid with their lives to give constitutional protections to all citizens of this land. They did not give over their lives to establish a doctrine which gives judges wrongful authority to determine guilt and innocence by cronism rather than by Fifth Amendment guarantees.

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UNITED STATES DISTRICT COURT

MARY ELLEN CHRISTIANSEN

V

DR. ROBERT SMITH, UTICA POLICE DEPARTMENT and ONEIDA COUNTY DISTRICT ATTORNEY'S OFFICE.

CASE NUMBER: 92-CV-200

IT IS ORDERED AND ADJUDGED: that the plaintiff's complaint is dismissed as against defendant Dr. Smith as in accordance with Judge McAvoy's Order dated February 10, 1993 which granted the defendant summary judgment; also as against defendant Onieda County District Attorney's Office as in accordance with Judge McAvoys's Order dated Febraury 10, 1993 which granted the defendant summary judgment;
and defendants Judge Anthony Garramone and Judge Matthew Ogonowski were previously dismissed as in accordance with Judge McAvoy's Order dated December 26, 1992;
and defendant Utica Police Department was previously dismissed as in accordance with Judge McAvoy's Order dated December 26, 1992.

February 25, 1993
Date

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PRESENT:

Hon. Wilfred Feinberg
Hon. Roger J. Miner
Hon. J. Daniel Mahoney
Circuit Judges.

MARY ELLEN CHRISTIANSEN,
Plaintiff-Appellant,

v.

ROBERT SMITH, Dr., UTICA POLICE DEPARTMENT, ONEIDA COUNTY DISTRICT ATTORNEY'S OFFICE, HON. ANTHONY GARRAMONE, HON. MATTHEW OGNOWSKI,
Defendants-Appelles.

UPON CONSIDERATION of this appeal from a judgment of the United States District Court form the Northern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is affirmed.

Plaintiff-appellant Mary Ellen Christiansen appeals from a February 26, 1993 judgment of the United States District Court for the Northern District of New York (McAvoy, C.J.) dismissing her

complaint brought pursuant to 42 U.S.C. 1983, the district court having granted the motions to dismiss of defendants-appellants Judges Garramone and Ogonowski and the motions for summary judgment of defendants-appellants Dr. Smith, the Utica Police Department and the Oneida County District Attorney's Office.

On February 11, 1992, Christiansen filed a pro se complaint in the action in which this appeal arises. The facts underlying this complaint are as follows: Christiansen was charged with aggravated harassment in the second degree under N.Y. Penal Law 240.30 (the Court ignored the 240.25(2) unconstitutional statute) after Smith filed a complaint with the Utica Police Department and made out a City Court information in which he alleged that on November 8, 1989 Christiansen had harassed and threatened him. A summons was issued by Judge Garramone of the Utica City Court, and Christiansen was arraigned

before Judge Ogonowski. The charges against Christiansen eventually were adjourned in contemplation of dismissal. An order of protection was issued by Judge Ogonowski, however, requiring Christiansen to stay away from Smith and to refrain from telephone contact with him.

In her amended complaint, Christiansen alleges that Smith "filed a false accusatory statement" alleges false arrest, harassment and malicious prosecution on the part of the Utica Police Department, malicious prosecution on the part of the Oneida County District Attorney's Office and challenges various actions of Judge Garramone and Ogonowski relating to the summons, the arraignment and the hearings held on the charges brought against her.

The district court properly dismissed the complaint as to Judges Garramone and Ogonowski for failure to state a claim because these judges had absolute immunity from suit. A judge is absolutely immune

from suit for money damages unless the suit is based on nonjudicial actions. See MIreless v Waco 112 S. Ct. 286, 288 (1991); Fields v Soloff, 920 F. 2d 1114, 1119 (2d Cir. 1990). Here Christiansen's claims against Judges Garramone and Ogonowski all relate solely to the issuance of the summons, the arraignment and hearings held on the charges brought against her--acts performed in a judicial capacity.

The district court properly granted summary judgment in favor of the Utica Police Department. Summary judgment under Fed. R. Civ. P. 56(c) is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Bryant v. Maffucci, 923 F. 2d 979, 982 (2d Cir.) cert. denied, 112 S. Ct. 152 (1991). A municipal defendant such as a police department is liable for money damages resulting from the unconstitutional acts of its employees only if the injury results from the execution of an

established municipal policy. See Monell v. Department of Social Services., 436 U.S. 658, 690 (1978). Here, Christiansen has not asserted that the Utica Police Department established or acquiesced in any unlawful custom or policy which resulted in constitutional injury to her. Id. at 694.

Summary judgment also was proper as to the Oneida County District Attorney's Office. Prosecutors are absolutely immune from liability for damages resulting from the initiation and pursuit of prosecution. See Imbler v. Pachtman, 424 U.S. 409, 409-31 (1976); Ying Jing Gan v. New York, 996 F.2d 522, 530 (2d Cir. 1993). Since the only allegations Christiansen makes against the District Attorney's Office relate to its prosecution of charges against her, it is absolutely immune form suit.

Finally, summary judgment in favor of Dr. Smith was proper. Section 1983 provides a cause of action for a plaintiff who has been deprived of a federally protected right

by an individual acting under color of state law. The plaintiff thus must show that there was both "state action" and a "state actor". Dahlberg v. Becker, 748 F. 2d 85, 89 (2d Cir.), cert. denied, 470 U.S. 1084 (1985). Smith is a private individual, not a state actor, and his alleged misuse of the state process can be attributed to the state. Id. at 90-91.

Hon. Wilfred Feinberg,

Hon. Roger J. Miner

Hon. J. Daniel Mahoney
Circuit Judges